79-139

in the

Supreme Court

of the

United States

OCTOBER TERM 1979

CASE NO.

MARTIN BLITSTEIN,

Petitioner,

vs.

THE FLORIDA BAR,

Respondent.

In The Matter of MARTIN BLITSTEIN,
Relator,

ALTERNATIVE PETITION FOR WRIT OF CERTIORARI OR PROHIBITION TO THE SUPREME COURT OF FLORIDA

MELVYN KESSLER, ESQUIRE
Attorney for Petitioner
1531 N.W. 15th Street Road
Miami, Florida 33125
(305) 324-4104

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

in the

Supreme Court

of the

United States

OCTOBER, 1979

CASE NO.

MARTIN BLITSTEIN,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

IN THE MATTER OF: MARTIN BLITSTEIN,

Relator.

ALTERNATIVE PETITION FOR WRIT OF CERTIORARI OR PROHIBITION TO THE SUPREME COURT OF FLORIDA

The Petitioner, MARTIN BLITSTEIN, prays that an alternative writ of certiorari issue to review the order of the Supreme Court of Florida entered in the above-

styled case on February 23, 1979. In the alternative, Petitioner-Relator MARTIN BLITSTEIN, prays that a rule directing the Honorable Justices of the Supreme Court of Florida to show cause on a day certain why an alternative writ should not issue, directing the Honorable Justices of the Supreme Court of Florida (a) to vacate its order dated February 23, 1979 and (b) prohibiting the Honorable Justices of that Court from enforcing its order dated February 23, 1979 effectuating Mr. Blitstein's suspension from the practice of law.

OPINIONS BELOW

The opinion of the Supreme Court of Florida, printed in Appendix A hereto, *infra,* (p. App. 1) is reported at So.2d (Fla. 1979).

JURISDICTION

The order of the Florida Supreme Court was entered on February 23, 1979. Appendix A, *infra* (p. App. 1). A timely petition for rehearing was denied on May 2, 1979. Appendix B, *infra,* (p. App. 3). The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3), 28 U.S.C. 1651, and Rule 22, *Rules of the United States Supreme Court.*

QUESTIONS PRESENTED

1. Whether the right to practice law is subject to the protection of procedural due process and cannot be suspended, terminated, or destroyed without a hearing and may not be suspended, terminated, or destroyed based solely upon the fact of a conviction unless and until that conviction is rendered final by appropriate appellate review?

2. Whether a State Bar Integration Rule, having the effect of state-wide law applicable to all attorneys, is unconstitutional on its face or as applied to the petitioner when that law authorizes the summary suspension from the practice of law of any attorney convicted of a felony before that conviction is final within the meaning of procedural due process?

3. Whether a stay of proceedings directed towards Mr. Blitstein's right to practice law is required pending satisfaction of Mr. Blitstein's due process rights to exhaust his appellate remedies?

STATUTES INVOLVED

The Florida statutory provision involved, Rule 11.07, *Integration Rules of the Florida Bar,* is set forth in Appendix C, *infra,* (p. App. 4-6).

STATEMENT OF FACTS

A. Introduction.

Mr. Blitstein, a member of the Florida Bar, was summarily suspended from the practice of law by the Supreme Court of Florida. His suspension is predicated solely on a non-final conviction which is presently under appeal. His suspension was ordered by the Supreme Court of Florida (App. A) pursuant to the alleged authority of the State's Integration Rule (App. C).

On December 19, 1978 Mr. Blitstein was found guilty by a *petit* jury of two counts of a five count indictment. The first pertinent count alleged a violation of 18 U.S.C. 1343 emanating from Mr. Blitstein's purported

attempt to defraud a client by means of false representations concerning the latter's status as a potential defendant in a criminal prosecution.

The second pertinent count alleged a violation of 18 U.S.C. 1952 (The Travel Act) based upon a purported attempt to extort money from the same client as proscribed by 18 U.S.C. 875. Mr. Blitstein continues to stand on his plea of not guilty.

Timely, Mr. Blitstein petitioned the Florida Supreme Court to withhold suspension from the practice of law pending his exhaustion of appellate remedies. Without a *de novo* or any evidentiary hearing as to the underlying factual matrix purportedly supporting the conviction and without any other hearing on his petition, the Supreme Court of Florida suspended Mr. Blitstein from the practice of law.

B. Mr. Blitstein's Position.

As is more fully set forth below, Mr. Blitstein opposes suspension at this time (a) based upon his right to procedural due process under the Fourteenth Amendment of the United States Constitution and (b) the "facial" and "as applied" unconstitutionality of the Florida law allegedly authorizing the suspension from the practice of law based solely upon a non-final conviction. More particularly it is Mr. Blitstein's position that:

(a) The Fifth Amendment of the United States Constitution protects citizens against loss of . . . property without due process of law and is applicable to the States via the Fourteenth Amendment.

(b) A license to practice law is an asset of such value as to fall within the ambit of due process protections. *Willner v. Committee on Character,* 373 U.S. 961 (1963).

(c) Due process requires notice and an adequate hearing as a precondition to the taking of property.

(d) Either a *de novo* hearing before the Supreme Court of Florida or a hearing which fully *and finally* determines Mr. Blitstein's guilt of a felony would be sufficient to satisfy the constitutional requirement to due process of law.

(e) Suspension from the practice of law of any attorney cannot be ordered absent a hearing sufficient to satisfy this constitutional requirement.

(f) A mere finding of guilt by a *petit* jury is insufficient for this purpose since that finding is voidable and is not final unless it is sustained by appropriate appellate review.

(g) Any state law which authorizes the taking of a license to practice law in contravention of the procedural due process requirements outlined above is unconstitutional on its face.

(h) Any state law which is employed purportedly to take Mr. Blitstein's license to practice law in the absence of any hearing or a hearing satisfying (d) above is unconstitutional as applied to Mr. Blitstein.

REASONS FOR GRANTING THE WRIT

1. Whether the right to practice law is subject to the protection of procedural due process and cannot be suspended, terminated, or destroyed without a hearing and may not be suspended, terminated or destroyed based solely upon the fact of a conviction unless and until that conviction is rendered final by appropriate appellate review?

The first question presented involves a matter never before decided by this Honorable Court and calls to question the applicability of the procedural due process requirements and Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States to the destruction or suspension of an attorney's right to practice law while he appeals from a conviction.[1] It involves the application of fundamental constitutional concepts which, apparently and regrettably, have been ignored by the lower court.

Like disbarment, suspension from the practice of law is punitive action. *In re Ruffalo,* 390 U.S. 544 (1968); *In re Gilbert,* 276 U.S. 294 (1928). A license to practice law is in the nature of a property right, pursuant to which an attorney is able to earn a living. *In Ex Parte Burr, Wheat* at 530, Chief Judge Marshall said,

> "... the profession of an attorney is of great importance to an individual, and the prosperity of his life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him."

[1]This Honorable Court was presented with this question in *In the Matter of John Mitchell,* Dkt. No. D-45 and *In the Matter of Robert Mardian,* Dkt. No. 46 but did not decide the matter, awaiting, instead, the outcome of the respondents' appeals and certiorari proceedings.

A license to practice law cannot be suspended or destroyed without procedural due process. It makes not difference whether a law license is characterized as a "right" or as a "privilege" since this Court's decisions have rejected the contention that the availability of due process protection turns upon any such characterization. *Graham v. Richardson,* 403 U.S. 365, 374, (1971); *Goldberg v. Kelly,* 397 U.S. 254 (1970). *Board of Regents v. Ross,* 408 U.S. 564 (1972) and case authorities cited therein. Indeed, in *Willner v. Committee on Character,* 373 U.S. 961 (1963), this Court specifically said:

> "Moreover, the requirements of procedural due process must be met before a State can exclude a person from practicing law."

Procedural due process requires adequate notice and a hearing. *Sherbert v. Verner,* 374 U.S. 398 (1963) (disqualification for unemployment compensation); *Slochower v. Board of Education;* 350 U.S. 551 (1956) (discharge from public employment); *Speiser v. Randall,* 357 U.S. 513 (1958) (denial of tax exemption) *Goldberg v. Kelly, supra,* (withdrawal of welfare benefits); *Bell v. Burson,* 402 U.S. 535 (1971) (suspension of driver's license); *Wisconsin v. Constangineau,* 400 U.S. 433 (1971) ("posting an individual to prohibit sale of alcoholic beverages to him"); *Connell v. Higginbatham,* 403 U.S. 207 (1971) (discharge from public employment). It follows that no person, including a practicing attorney, can constitutionally be suspended

from such practice or disbarred in the absence of a hearing sufficient to meet the requirements of procedural due process. Documentary proof of a non-final conviction, without more, is constitutionally insufficient to satisfy procedural due process requirements. *Joyner v. State,* 30 So.2d 304 (Fla. 1947) (a previous conviction may not be employed to enhance punishment in a subsequent case unless such conviction is final and if an appeal has been taken from a judgment of guilty in a trial court that conviction does not become final until the judgment of the lower court has been affirmed by the appellate court).

Logic and essential fairness also dictates the same conclusion. Since a conviction obtained in contravention of law is, in fact, a nullity and since convictions often are reversed and nullified because of unfairness and other error, suspension prior to the completion of appellate review, based solely upon a jury's verdict and the imposition of sentence, is unfair and unconstitutional.

Mr. Blitstein's position was and is supported by decisions of this and other, lower federal courts. *Pino v. Landon,* 349 U.S. 901 (1955); *In Re: Ming,* 469 F.2d 1352 (7th Cir. 1972); *Will v. Immigration and Naturalization Service,* 444 F.2d 529 (7th Cir. 1971).

In *Pino v. Landon, supra,* this Honorable Court vacated a deportation order entered by the Court of Appeals for the First Circuit on the grounds that it was not consistent with due process to order the deportation of an alien because of a criminal conviction which has not "attained such finality" as to support such an order. (The facts of *Pino* set forth in *Pino v. Nicholls,* 215 F.2d 237 (lst Cir. 1954). Pino, an alien, had been convicted of

petty larceny. Twice he withdrew his appeal and, seemingly, therefore waived his right to test the legality of his conviction by appellate review. His original jail sentence, however, thereafter had been suspended and a period of probation imposed. At the conclusion of the probation period his case was placed in what was called an "on-file status". 215 F.2d at 242. The First Circuit determined that this "on-file status" provided the Massachusetts district court with the power to indefinitely postpone a determination as to whether the ends of justice required the imposition of a prison sentence. The First Circuit determined, therefore, that, in theory, Pino's case could later be taken from the file and the subject of a prison sentence. Pino asserted that he would be entitled to appeal from any sentence in the event his case was taken from the "on-file status" and that therefore his case and its conviction lacked a "finality" as to whether he had, in fact, been "convicted." 215 F.2d 242.

Based upon these unusual facts the First Circuit agreed that ordinarily a *verdict* of guilty was insufficient for an order of deportation unless and until that guilty verdict was affirmed upon appropriate appellate review. The court said 215 F.2d 244:

> "The government contends that upon a plea of not guilty, the statutory requirement of being 'convicted' is satisfied, without more, when a verdict of guilty is returned by the jury, or a finding of guilty is made by the court, as the case may be. We are not prepared to assent to this proposition. A verdict or finding of guilty is usually followed by a motion for a new trial which, as we know, and as we so in Pino's petty

larceny case, frequently results in the award of a new trial. So, too, appeals from conviction in the trial court often result in the award of a new trial. So too, appeals from conviction in the trial court often result in the award of a new trial. Judicial action on the motion for a new trial made immediately after verdict or finding of guilt, and judicial action in the normal routine appellate review provided by law, part of the ordinary processes of reexamination, the outcome of which perhaps ought to be awaited before it can be said, with sufficient certainty and definitude, that the State has 'convicted' the alien of crime."

Despite this analysis, the First Circuit ordered the deportation of Pino, mostly because of the unusual circumstances in that case, which included a lengthly delay and voluntary waiver, at one time, of the right to appellate review of the conviction in question. When this Court reversed this First Circuit, however, it noted the non-finality of the conviction.

If the "conviction" in *Pino* was not sufficiently "final" for purposes of subjecting Pino to deportation, then Mr. Blitstein's conviction is certainly not sufficiently "final" for purposes of suspension where the conviction was suffered on December 19, 1978, and where, ordinarily, appropriate appellate procedures are already in process and are anticipated to be protracted. Indeed, the right to practice law cannot, as a matter of procedural due process, be taken away on the basis of the *petit* jury verdict of guilty alone, when such a verdict was determined by this Court in *Pino* be constitutionally insufficient to sustain the deportation of an alien.

This precise point was considered in *In Re Ming, supra.* There the United States Attorney filed a petition before the executive committee of the District Court seeking Ming's suspension or disbarment *pending* his appeal from a misdemeanor conviction. The application was based upon a local Rule which provided that the Executive Committee could disbar an attorney who had been convicted of a misdemeanor or committed other acts of misconduct. The District Court entered an order of disbarment.

The Seventh Circuit reversed the order of disbarment, urging that ". . .the suspension for 'conviction' of a misdemeanor took place before the conviction had reached finality." 469 F.2d at 1353. In doing so the court also said at page 1354:

> "In looking at the panoply of individual rights, we do not find a basis for awarding a citizen lawyer a lesser position than the alien."

The Seventh Circuit's decision relied in part upon *Will v. Immigration and Naturalization Service, supra,* another case in which the deportation of the alien had been stayed pending appeal from a conviction when the conviction, standing alone, was the sole basis for the deportation sought.[2]

---

[2]The Seventh Circuit went on to conclude that Ming's conviction would not be "final" within the meaning of due process of law so long as writ of certiorari to this Court could be filed, and that Ming would not lose his license to practice law absent, a *full evidentiary hearing* before the applicable tribunal. See also *Reich, The New Property,* 73 Yale L.J. 733 (1964).

Although Mr. Blitstein has been convicted by a jury of having violated 18 U.S.C. 1343 and 1952, this conviction is voidable and cannot be considered final until and unless it is affirmed as free from error. The lower court's order suspending Mr. Blitstein at this time, based soley on the non-final conviction, violated principles of procedural due process and deprived him of property rights which could not be restored—his livelihood—even were his conviction to be nullified by the pending appellate or subsequent certiorari proceedings. The suspension and its adverse effect on Mr. Blitstein's livelihood also deprived him of equal protection of the law.

2. Whether a state Bar Integration Rule, having the effect of state-wide law applicable to all attorneys, is unconstitutional on its face or as applied to the Petitioner when that law authorizes the summary suspension from the practice of law of any attorney convicted of a felony before that conviction is final within the meaning of procedural due process.

The second question also involves a matter never before decided by this Court: the "facial" or "as applied" unconstitutionality of a state-wide law, limited only to attorneys, which authorizes the destruction of the right to practice law and thus maintain their livelihood pending an appeal, based solely on the non-final conviction. This question also involves the applicability of the due process requirements and Equal Protection Clause of the Fourteenth Amendment.

In pertinent part[3] Rule 11.07, Integration Rule, *supra,* provides:

> (1) *Determination or judgement of guilt.* Determination or judgment of guilt of a member of the Florida Bar by a court . . . *upon trial* . . . of any crime . . . that is a felony . . . *shall be conclusive proof of the guilt of the offense charged for purposes of these rules* . . . (emphasis added).
>
> * * * *
>
> (3) *Suspension by judgment (other than by state court).* If any such determination or judgment of guilt is entered by any court other than a court of the State of Florida, the convicted attorney shall stand suspended as a member of the Florida Bar on the 11th day following the filing with the clerk of the Supreme Court of a certified copy of such determination or judgment, accompanied by proof of service of notice of such filing upon the convicted attorney; provided, however, that if the convicted attorney shall prior to the 11th day file a petition with the Supreme Court to modify or terminate the suspension, then the suspension will be deferred until entry of an order upon the petition.

The very language of the law, which purports to sanction the destruction of an attorney's right to practice law and

[3]Please refer to Appendix C (p.App. 3-4) for the entire Integration Rule.

thus his livelihood while appealing from a conviction based solely on the voidable, non-final conviction, is unconstitutional on its face. See authorities *op. cit.* Worse, the lower court's failure to accord Mr. Blitstein a hearing *de novo* or any hearing on the purported authority of the subject law rendered Rule 11.07, *supra*, unconstitutional as applied to him. Indeed, the failure to accord Mr. Blitstein any hearing contravened the lower court's own precedent. See *The Florida Bar vs. Fussell*, 179 So.2d 852 (Fla. 1965), *after remand* 189 So.2d 881.

3. **Whether a stay of proceedings directed towards Mr. Blitstein's right to practice law is required pending satisfaction of Mr. Blitstein's due process rights to exhaust his appellate remedies.**

The suspension ordered by the Supreme Court of Florida at this time should be vacated and proceedings thereon prohibited or stayed until Mr. Blitstein's appropriate appellate remedies are exhausted. Suspension at this time has and will continue to deprive Mr. Blitstein of his right to continue to earn a livelihood without any possibility of reimbursement of the losses suffered thereby, even were his conviction to be vacated upon appellate review or certiorari proceedings. For this reason and the obvious irreparable injury Mr. Blitstein has and will continue to suffer, upon vacating the lower court's order of suspension, all proceedings thereon should be temporarily prohibited or stayed pending exhaustion of his appellate and certiorari remedies.

CONCLUSION

For the reasons previously set forth and on the authorities cited and argued, the Florida Supreme Court's order suspending Mr. Blitstein from the practice of law pending his appeal from the legally non-final conviction which is the sole predicate of that suspension should be vacated and all proceedings thereon prohibited or stayed until and unless the conviction is finalized.

Respectfully submitted,

MELVYN KESSLER, ESQUIRE
Attorney for Petitioner
1531 N.W. 15th Street Road
Miami, Florida 33125
(305) 324-4104

BY_____
MELVYN KESSLER, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petition was mailed to the Executive Director of the Florida Bar, The Capitol, Tallahassee, Florida 32304, and to the Honorable Sid White, Clerk, Florida Supreme Court, Supreme Court Building, Tallahassee, Florida 32304, this the day of July, 1979.

MELVYN KESSLER

Appendix

APPENDIX "A"

IN THE SUPREME COURT OF FLORIDA

FRIDAY, FEBRUARY 23, 1979

CASE NO. 55,984

THE FLORIDA BAR,
Complainant,

vs.

MARTIN BLITSTEIN,
Respondent.

The Florida Bar having filed on January 15, 1979, letter treated as Petition to Suspend showing that Martin Blitstein had been convicted of a felony in a court other than a court of the State of Florida and having accompanied said notice by proper proof of service, and the above-named attorney having filed a Petition to Withhold Suspension with the Court requesting modification or termination of the suspension, it is hereby ordered that the Petition to Withhold Suspension is denied, and Martin Blitstein is suspended from The Florida Bar pursuant to article XI, Rule 11.07(3) of the Integration Rule of The Florida Bar; and it is further

ORDERED that this suspension shall be effective March 26, 1979, thereby giving Respondent thirty (30) days to close out his practice and take the necessary steps to protect his clients; and it is further

ORDERED that Respondent shall not accept any new business.

ENGLAND, C.J., BOYD, OVERTON, SUNDBERG and HATCHETT, JJ., concur

TC
cc: Scott K. Tozian, Esquire
Melvyn Kessler, Esquire
Martin Blitstein, Esquire

A True Copy
TEST: Sid J. White
Clerk Supreme Court

APPENDIX "B"

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, MAY 2, 1979

CASE NO. 55,984

THE FLORIDA BAR,
Complainant,

vs.

MARTIN BLITSTEIN,
Respondent.

On consideration of the petition for rehearing filed by attorney for respondent, and reply thereto,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

C
cc: Melvyn Kessler, Esquire
Mr. Martin Blitstein
Anita F. Dahlquist, Esquire
Scott K. Tozian, Esquire

A True Copy
TEST: Sid J. White
Clerk Supreme Court

APPENDIX "C"

INTEGRATION RULE

Rule 11.07: Discipline Upon Conviction

(1) Determination or judgment of guilt. Determination or judgment of guilt of a member of The Florida Bar by a court of competent jurisdiction upon trial or plea of any crime or offense that is a felony under the laws of this state, or under the laws under which any other court making such determination or entering such judgment exercises its jurisdiction, shall be conclusive proof of the guilt of the offense charged for the purposes of these rules. Upon such determination or entry of such judgment of guilt by any court of this state, the judge or the clerk thereof shall transmit a certified copy of such determination or judgment to the clerk of this court and to the Executive Director of The Florida Bar.

(2) Suspension by judgment (Florida). If such judgment of guilt is entered by a court of the State of Florida, the convicted attorney shall stand suspended as a member of The Florida Bar on the 11th day following the entry of the judgment unless he shall before that day file a petition with the Supreme Court to modify or terminate such suspension as elsewhere provided. If such petition is filed on or before the 10th day following the entry of the judgment, the suspension will be thereby deferred until entry of an order upon the petition.

(a) Petition to modify or terminate suspension. At any time after the entry of a judgment of guilt, the convicted attorney may file a petition with the

Supreme Court to modify or terminate such suspension and shall serve a copy thereof upon the Executive Director.

An opportunity to respond to the petition and appear at any hearing on the petition shall be afforded to The Florida Bar. If such petition is filed after the 10th day following the entry of judgment of guilt, the suspension shall remain in effect pending disposition of the petition. Modification or termination of suspension shall be granted only upon a showing of good cause.

(b) Continuation of suspension until final disposition. If an appeal is taken by the convicted attorney from the judgment of the trial court in the criminal proceeding, and on review the cause is remanded for further proceedings, the suspension shall remain in effect until the final disposition of the criminal cause unless modified or terminated by the Supreme Court as elsewhere provided.

(c) Termination of suspension. Such suspension shall continue until final disposition of the criminal cause unless sooner terminated by order of the Supreme Court as elsewhere provided. A final disposition of the criminal cause resulting in acquittal will terminate the suspension. A final termination of the criminal cause resulting in a determination or judgment of guilt shall continue the suspension until expiration of all periods for appeal and rehearing, and until after termination of disciplinary proceedings by The Florida Bar as elsewhere provided.

(3) Suspension by judgment (other than by state court). If any such determination or judgment of guilt

is entered by any court other than a court of the State of Florida, the convicted attorney shall stand suspended as a member of The Florida Bar on the 11th day following the filing with the clerk of the Supreme Court of a certified copy of such determination or judgment, accompanied by proof of service of notice of such filing upon the convicted attorney; provided, however, that if the convicted attorney shall prior to the 11th day file a petition with the Supreme Court to modify or terminate the suspension, then the suspension will be deferred until entry of an order upon the petition.

(4) Disciplinary judgment after conviction. If a determination or judgment of guilt of a felony is entered against a member of The Florida Bar and becomes final without appeal or by affirmance on appeal, such judgment shall be conclusive proof of the guilt of the offense charged. The suspension imposed on the conviction shall after final conviction, remain in effect until the convicted attorney is reinstated under the rule herein provided for reinstatement or The Florida Bar may at any time after final conviction initiate a disciplinary action against the convicted attorney if deemed advisable.

As amended effective June 30, 1969 (225 So.2d 881); as amended May 31, 1972, effective Dec. 1, 1972 (262 So.2d 857).